B ARD OF INQUIRY (*Hun Rights Code*)

IN THE MATTER OF the Ontario *Human Rights Code*, R.S.O. 1990, c. H.19, as amended; AND IN THE MATTER OF the complaints by Tracy Odell, dated August 27, 1996; Helen Sarlina dated August 26, 1996; David Condie, dated November 14, 1996; Kelly Cluskey, dated December 4, 1996; Ralph Edwin Lang, dated December 12, 1996; and Jeremiah Shell, dated December 9, 1996 alleging discrimination with respect to services on the basis of handicap.

B E T W E E N:

Ontario Human Rights Commission

-and-

Tracy Odell; Helen Sarlina; David Condie; Kelly Cluskey; Ralph Edwin Lang; Jeremiah Shell

Complainants

- and -

The Toronto Transit Commission

Respondent

INTERIM DECISION

Adjudicator : Mary Anne McKellar

Date : January 17, 2001

Board File No: BI-0335/336/337/338/339/340-00

Decision No : 01-002-I

Board of Inquiry (*Human Rights Code*)
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APPEARANCES

Ontario Human Rights Commission	)	Kikee Malik, Counsel
Tracey Odell; Helen Sarlina; David Condie; Kelly Cluskey , Complainants	)	on his/her own behalf
Jeremiah Shell, Complainant	)	Seema Lamba, Counsel
TorontoTransit Commission, Respondent	)	Paul Schabas and Vicky White, Counsel

INTRODUCTION

The Ontario Human Rights Commission ("the Commission") combined the complaints of six individuals against the Toronto Transit Commission ("the TTC") and referred them to the Board of Inquiry ("the Board"). Common to all the complaints were allegations that the introduction of a registration fee and interview process as conditions to the complainants' use of the Wheel-Trans service constituted discrimination in the provision of services on the basis of handicap.

ISSUES

The Commission, the TTC and the Complainant Tracey Odell ("Odell") all filed pleadings before the Board. The TTC moves to strike Odell's pleadings.

The TTC also served a Notice of Motion seeking to have the Board determine on a preliminary basis whether Wheel-Trans service constitutes a "special program" within the meaning of s. 14 of the *Human Rights Code*, R.S.O. 1990, c.H.19, as amended ("the *Code*"). The Commission served a Notice of Motion seeking to quash the TTC's motion.

This decision deals with the TTC's motion to strike Odell's pleadings, and the Commission's motion to quash the TTC's motion seeking a preliminary determination with respect to the applicability of s. 14 to these proceedings.

DECISION

The Board grants the TTC's motion. The Odell pleadings are struck.

The Board grants the Commission's motion. The TTC's preliminary motion to have Wheel-Trans declared a "special program" is quashed.

MOTION TO STRIKE ODELL'S PLEADINGS

As noted above, common to all of the complaints referred to the Board were allegations with respect to the TTC's imposition of a registration fee and requirement that prospective Wheel-Trans riders submit to an interview process as conditions of qualification to use the service. The Commission's Statement of Facts and Issues, served and filed pursuant to Rule 35 of the Board's Rules of Practice, dealt exclusively with these issues.

Although each complainant was entitled to serve and file his or her own Statement of Facts and Issues, only Odell chose to avail herself of that opportunity. Her Statement of Facts and Issues alleges not only that the registration fee and the interview process for prospective riders constitute unlawful discrimination under the *Code*, but also that the TTC's failure to render its conventional service more accessible to persons with a handicap, and the quality of the service provided by Wheel-Trans, constitute unlawful discrimination. She seeks remedies that are uniquely referable to these allegations.

The TTC's position on its motion is that Odell's additional allegations exceed the scope of her complaint. Essentially, the TTC says, she is attempting to amend her complaint without having formally sought leave of the Board to do so. The TTC submits that such an amendment would not be permissible because it would prejudice the TTC, it would unduly lengthen the hearing, and the allegations have not been investigated by the Commission.

The Commission takes no position on the motion. Counsel did, however, point out that the Board has the discretion to strike all or part of a pleading, and that certain aspects of Odell's pleadings may be considered by the Board to provide a context in which it must consider the legal issues involved, namely, whether Wheel-Trans constitutes a special program under s. 14 (as the TTC contends) or whether it should be conceived of

as a form of accommodation, measured against the standards set out in s. 17 of the *Code* (as the Commission contends). If the Board considers these portions of the pleadings as providing that context, the Commission submits that it may not be appropriate to strike them.

The Board finds that the allegations in Odell's pleadings relating to the inadequacies of the Wheel-Trans service and the inaccessibility of the TTC's conventional service are beyond the scope of her complaint. In determining whether to strike those pleadings or permit them to stand, the Board must address the following questions:

- Do the allegations form part of the continuum of facts of the complaint?
- Would an amendment to the complaint to include these allegations be appropriate in the circumstances?
- Do the allegations provide a useful context for considering the legal issues in the case?

The Board in *Entrop v. Imperial Oil Limited* (1994), 23 C.H.R.R. D/186 was dealing with a complaint filed after an employee who disclosed previous substance abuse was transferred from his position. Subsequent to the filing of the complaint, the employee was reinstated subject to conditions and the Board held that the complaint need not be formally amended to permit allegations to be made and evidence to be led with respect to the propriety of that reinstatement process, because it formed part of the continuum of facts of the original case. The critical passage in the Board's reasoning appears at Paragraph 4:

> There will always be some delay between the filing of a complaint and the hearing of the matter before a board of inquiry. Where the parties to the case remain in a continuing relationship, events will continue to unfold. The questions concerning the process of reinstatement fall squarely within the original ground of employment discrimination alleged by the complainant. The information sought to be added is in the nature of a continuum of the matters asserted in the first instance. The issue of reinstatement is not severable from the issue of job loss. The evidence simply relates to a single issue over a continuing time. There is no need to obtain an amendment to the complaint on these issues.

In *Entrop*, therefore, the additional facts could not have been included in the original complaint as they had not yet crystallized. By contrast, here, the issues that Odell seeks to have added in her additional pleadings do not relate to events or facts occurring or information acquired subsequent to the filing of her complaint. She knew that the TTC's conventional system was not accessible, and she had concerns about the quality of the Wheel-Trans service at the time she filed her complaint. Nevertheless, the articulation of that complaint specifically excluded matters other than the registration process and the fee for Wheel-Trans use.

The Respondent included in its motion materials a number of pieces of correspondence authored by Odell which make clear the deliberate omission of the concerns about accessibility and quality of service from the complaint. Odell commenced the complaint process on June 6, 1996 by writing to then Chief Commissioner Rosemary Brown on behalf of herself and two others. This letter contained the following paragraph, which appeared in bold print:

> **While the inequitable service system, on its own, may constitute numerous human rights violations, (and we understand the Commission has received several complaints over the years with respect to Wheel-Trans), the focus of this complaint is upon the registration fee: Not only are we compelled to use a segregated, unequal service, but we are required to register for it; medically validate our disability; be interviewed by a committee to demonstrate just how disabled we are; and now, as a final blow, we will be forced to pay for the "privilege" of this "separate-but-equal" service by being *required* to pay a fee which non-disabled people accessing their publicly funded transportation are not required to pay! We wish to express, in the strongest possible terms, that we feel being forced to pay a registration fee for a special service we are compelled to use due to lack of adequate planning for wheelchair access in the regular system is discriminatory.**

In addition, Odell's handwritten amendments to the Commission's original version of her complaint, signed August 27, 1996 included two additional statements (emphasis in original):

> The conventional service is <u>NOT</u> wheelchair accessible.

> Wheel-Trans and conventional service ought to be equal in terms of the fee charged to patrons.

Most tellingly, Odell's reply to the Respondent's response to her complaint stated (emphasis in original):

> . . . I emphatically dispute the TTC's claim that there is no violation of my right to receive equal treatment as a result of "... the charging of any registration fee." **This is the crux of my entire complaint.**
>
> .....
>
> I prefer my complaint to be kept separate, so I am not given the additional burden of replying to a long series of paragraphs pertaining to matters which may not be under dispute with respect to my complaint. My complaint is about the charging of a registration fee and my contention that it is discriminatory to charge such a fee of patrons with disabilities but not of patrons who are not disabled; not about whether Wheel-Trans is a special service.
>
> .....
>
> **I believe that the act of charging a registration fee to people with disabilities who need to use public transit, while those who do not have disabilities are NOT required to pay any registration fees or extra fees of any kind, is, in fact, unequal treatment, (i.e. differential treatment) to me, as a person with a disability, and therefore discriminatory, illegal, and prohibited by the Ontario Human Rights Code.** (See Roberts vs Ministry of Health, 1994). I respectfully request the OHRC use whatever means possible to direct the TTC to discontinue this discriminatory practice, and restore the $25.00 illegally obtained by the TTC, through Wheel-Trans, from people with disabilities.

Odell amended the investigator's typed notes of his interview with her to include the following statement under the question "who drafted your complaint?" (emphasis in original):

> I sent a letter to the OHRC. The Commission prepared a complaint form which I modified to emphasize the focus of my complaint: that the $25.00 charge imposed upon persons with disabilities to use public transit, when it is not imposed upon non-disabled persons to use public transit, is a discriminatory practice.

The Board cannot find that the allegations respecting the adequacy of the Wheel-Trans service or the inaccessibility of the conventional service form part of the continuum of the Complaint. Might those allegations be the proper subject of an amendment to the Complaint?

The Board has jurisdiction to amend complaints. In deciding whether or not to permit such amendments, the Board is exercising its discretion. The factors influencing how that discretion will be exercised include the following:

- Whether the amendment would occasion actual prejudice to the other party;
- Fairness;
- The conduct of the party seeking the amendment;
- The impact of the proposed amendment on the course of the hearing and any other parties.

The Respondent asserted that the Odell allegations would prejudice it, but did not lead any evidence of actual prejudice. There is no doubt that to enquire into the allegations would broaden the scope of the hearing considerably, would lengthen the proceedings, and might necessitate the calling of expert evidence on, for example, how the delivery of transportation services through a separate and exclusive system is experienced by its disabled passengers. This significant alteration in the scope of the case would come, of course, on the eve of the hearing. In the absence of evidence, however, all of the above falls short of establishing actual prejudice to the Respondents that could not be cured by an adjournment. There is, thus, no evidence of actual prejudice that would militate against allowing Odell's complaint to be amended to include her additional allegations.

The factors that do militate against allowing such amendment, however, are Odell's conduct, and the impact on the hearing and the other parties to altering the scope of what is at stake at this late date. As detailed above, Odell has represented throughout the complaint and investigation process prior to referral to the Board that the focus of her

complaint was the $25.00 registration fee. It would be an inequitable exercise of the Board's discretion now to permit her to broaden the scope of her complaint, particularly where the manner in which she seeks to broaden it calls into question the entirety of the way in which the TTC delivers its services. To allow such amendment would necessitate an adjournment prior to the commencement of the hearing, would lengthen the hearing, and would lead to the litigation of issues not apparently in dispute between the Respondent and the other Complainants, without anyone having had the benefit of the Commission's investigation of these issues. A somewhat similar situation was the subject of a decision of the British Columbia Human Rights Tribunal in *Welch v. Eggloff (No. 2)* (1998), 34 C.H.R.R. D/481. Here the complainant's original complaint alleged that the termination of her employment contravened the legislation. That issue, however, was not referred to the tribunal, to the knowledge of the complainant, who did not attempt to reassert the issue until shortly before the hearing. The tribunal refused to amend the complaint to include allegations respecting the termination because to do so would have necessitated that additional evidence be adduced and a possible adjournment and would definitely have prolonged the hearing into the complaint, which was being heard along with "two other complaints that do not include a similar allegation" (at Paragraph 31). If anything, the case in *Welch* for granting the amendment was stronger than it is here, since the respondent had at least been put on notice at the outset that the propriety of the termination was potentially at stake in the proceeding.

So long as the TTC continues to operate Wheel-Trans and its conventional service remains inaccessible to persons in wheelchairs, there is nothing to prevent Odell from filing a complaint to the Commission respecting the adequacy of the Wheel-Trans service and the accessibility of the conventional service. Such complaint could be the subject of a thorough investigation by the Commission. She is, therefore, not prejudiced by the striking of her pleadings.

On the basis of all the above considerations, had Odell made a request to amend her complaint, the Board would not have exercised its discretion to do so by adding the allegations now contained in her pleadings.

It remains, finally, to determine whether the additional allegations in the Odell pleadings should be permitted to stand on the basis that they provide some context for the legal issues at stake in determining whether Wheel-Trans is a special service. The Board is not persuaded that this is the case. Pleadings themselves are not evidence. If evidence is necessary to enable the Board to appreciate the factual context of the legal issues that arise in respect of the "special service" issue, then that evidence will be relevant and admissible on that basis, and will not be rendered more admissible or more relevant because alluded to in the Odell pleadings. Certainly, there is nothing in that portion of the pleadings requesting remedies uniquely referable to allegations pertaining to the adequacy of the Wheel-Trans service or the accessibility of the conventional service that can possibly assist the Board in the "special service" inquiry.

The Odell pleadings are therefore struck.

MOTION TO QUASH TTC'S PRELIMINARY MOTION ON S.14

The Commission asserted several propositions in support of its motion to quash the TTC's preliminary motion to have Wheel-Trans declared a "special service" under s. 14(1) of the *Code*, and to have the case dismissed on that basis. Essentially, the Commission took the position that a determination with respect to the applicability of s. 14(1) would be premature at this point in the hearing. First, the Commission submitted that s. 14(1) operates as a defence to permit what would otherwise constitute a contravention of the *Code*, such that it would be inappropriate to determine the applicability of the defence in the absence of a prior determination that a *prima facie* infringement of the *Code* had occurred. Second, the Commission submitted that a determination with respect to the applicability of s. 14(1) would not end the inquiry, because "special programs" are not insulated from review for compliance with the *Code*. Rather, s. 14(1) has a dual purpose which is to exempt special programs from challenge by those not intended to benefit from them, while providing substantive protection from discrimination for those falling within the class of persons intended to benefit. Third, the

Commission submitted that the applicability of s. 14(1) was not an individually distinct issue that could be determined in isolation of the other defences that have been advanced in the case. Fourth, the Commission submitted that the Board should only determine the applicability of s. 14(1) against a full evidentiary record and after hearing full legal argument on all of the issues raised by the parties to the complaints. Fifth, the Commission submitted that the result of allowing the TTC motion to proceed would be to fragment the proceedings before the Board, and that this result should be avoided.

Counsel for the Complainant Shell submitted that s. 14 does not operate as an exemption at all.

The TTC's response to the Commission's motion was seven-pronged. First, it argued that s. 14 is a stand-alone provision of the *Code*, and that the legislation itself contemplates that its applicability will be determined separate and apart from the merits of any complaint. Second, it submitted that the Board has jurisdiction to deal with the applicability of s. 14 separately, and not merely in the context of whether it constitutes a defence to a complaint. Third, the TTC asserted that the facts of this case engage only the exemptive aspects of s. 14, and do not raise issues with respect to the substantive equality as among users of the Wheel-Trans service. Fourth, the TTC submitted that findings with respect to the particulars of the complaints would not be of assistance in determining whether s. 14 was applicable in the circumstances of this case. Fifth, it noted that the jurisprudence revealed instances in which decision-makers had determined the applicability of s. 14 in advance of any determination with respect to the merits of complaints. Sixth, it urged the Board to find that principles of judicial efficiency and economy favoured the preliminary determination of the applicability of s. 14. Seventh, and finally, it pointed out that the TTC has been requesting a determination with respect to this single issue from the moment it received these complaints.

Section 14 of the *Code* provides as follows:

14. (1) A right under Part I is not infringed by the implementation of a special program designed to relieve hardship or economic disadvantage or to assist disadvantaged persons or groups to achieve or attempt to achieve equal opportunity or that is likely to contribute to the elimination of the infringement of rights under Part I.

(2) The Commission may,
(a) upon its own initiative;
(b) upon application by a person seeking to implement a special program under the protection of subsection (1); or
(c) upon a complaint in respect of which the protection of subsection (1) is claimed, inquire into the special program and, in the discretion of the Commission, may by order declare,
(d) that the special program, as defined in the order, does not satisfy the requirements of subsection (1); or

(e) that the special program as defined in the order, with such modifications, if any, as the Commission considers advisable, satisfies the requirements of subsection (1).

(3) A person aggrieved by the making of an order under subsection (2) may request the Commission to reconsider its order and section 37, with necessary modifications, applies.

(4) Subsection (1) does not apply to a special program where an order is made under clause (2)(d) or where an order is made under clause (2)(e) with modifications of the special program that are not implemented.

(5) Subsection (2) does not apply to a special program implemented by the Crown or an agency of the Crown.

Notwithstanding that the above section permits the Commission to decide, absent a complaint, whether something constitutes a "special program" under s. 14 (1) of the *Code*, it has been held that the Board also has the jurisdiction, in deciding a complaint referred to it, to determine whether something constitutes a "special program", and, furthermore, to determine whether a program instituted by the Crown or an agency of it constitutes such special program. See *Ontario Women's Hockey Association v. Blainey* (1987), 8 C.H.R.R. D/4180 (Ontario H.J.C.), at Para. 33042; and *Ontario Human Rights*

Commission v. Ontario (1994), 19 O.R. (3d) 387 (C.A.) (*"Roberts"),* at pp. 402 ff. and pp. 424-25.

In certain circumstances decision makers called upon to determine whether a particular scheme constitutes a "special program" under s 14(1) or other similar legislation, have determined that issue at the outset of a proceeding without first hearing evidence on the issue of whether, in the absence of a "special program" finding, a *prima facie* case of unlawful discrimination could be made out. Those cases, however, appear to be largely distinguishable from the circumstances here. In *Broadley v. Steel Co. of Canada, Inc.* (1991), 15 C.H.R.R. D/408 (Ont. Bd. of Inquiry), a board of inquiry proceeded directly to the issue of whether certain provisions in a collective agreement amounted to a "special program", but the respondent in that case had already conceded a *prima facie* contravention of the *Code*:

> The parties were agreed that the extended pre-retirement vacation provision in the collective agreement in effect at the time of Mr. Broadley's complaint, differentiated between persons on the basis of age. It was also common ground that, unless s. 13 of the *Code* applied, Mr. Broadley's right to equal treatment in employment without discrimination on the basis of age was infringed when some employees were granted a benefit not available to him solely because of a difference of age. (at Para. 14)

Similarly, in *Re London Life Insurance Co. and Ontario Human Rights Commission et al.* (1985), 50 O.R. (2d) 748 (H.C.J.), the Court held that it had jurisdiction to determine an insurance company's application for a declaration that the provisions of its disabilty policy did not violate the *Code*, while simultaneously recognizing that the Commission possessed the jurisdiction to investigate the complaint filed with respect to the policy and determine whether to refer it. The Court noted, however, that the facts in the case before it were undisputed, as indeed they would have to be for the matter to be properly brought in the form of an application.

The final example of a case in which the status of a "special program" was considered apart from considerations of the circumstances giving rise to the complaint

was *Watson v. Human Rights Commission (N.S.)* (1995), 143 N.S.R. (2d) 302 (.S.C.). Once again, this was not a decision of a board of inquiry, but was, rather, the decision of a reviewing court on an application for *mandamus* to compel the Nova Scotia Human Rights Commission to deal with the complaint of a white male who complained that minority candidates had been preferred in a competition recruiting new police officers. The Commission had dismissed the complaint without referring it for hearing. The Court declined to quash the Commission's decision on the basis that a formal written affirmative action policy existed and that it had been approved by the Commission. Under the applicable legislation, "any approved program is deemed not to be a violation of the prohibitions of this Act". Thus, under the statutory regime in question, the existence of an approved program provided a complete defence to any complaint of discrimination. Additionally, the complainant Watson was not a member of a disadvantaged group intended to benefit from the preferred hiring policy. His challenge to that policy clearly raised for consideration the exclusive issue of whether the statutory exemption or defence applied, and not whether it promoted substantive equality among the members of the disadvantaged group.

By contrast to the above decisions, there is other jurisprudence suggesting that the determination of whether something qualifies as a "special program" and the implications of that finding ought to be determined on the basis of a full evidentiary record. Indeed, in *Blainey, supra*, the Court appeared to suggest that that the applicability of s. 14 (then s. 13) was better dealt with by a board of inquiry rather than by the Commission for just this reason:

> I agree with the submission that the parties will have a better opportunity to present their views in an open hearing held before a board of inquiry, as provided by the statute, rather than through written submissions to the Commission as proposed by applicants. (at Para. 33042)

Although it does not deal specifically with the applicability of s. 14, the Divisional Court decision in *Ontario College of Art v. Ontario (Human Rights Commission)* (1993), 11 O.R. (3d) 795 (Div. Ct.), is pertinent. This case involved an application for judicial review in which the applicants sought to quash the Commission's decision to refer a

complaint to a board of inquiry. The Attorney General for Ontario successfully intervened to quash the application for judicial review, and the Court noted (at p. 800) its preference that issues before administrative tribunals not be fragmented and that the Court reviewing have the opportunity to consider those issues in light of a full evidentiary record.

The Respondent relied on *E.J. Hannafin Enterprises Ltd. v. Esso Petroleum Canada* (1994), 17 O.R. (3d) 258 (Gen. Div.), to support its position that s. 14 be dealt with up front. This was a case involving the construction of several commercial contracts. The proceeding was commenced as an application, but the respondent to that application moved to have it converted to an action. The court declined to do so, notwithstanding that there was a potential triable action. The following passages summarize the court's reasoning:

> I would have thought that it made considerable sense in the proper case, from a commercial point of view, and also, in these days of protracted and expensive litigation, for a court to determine in a summary proceeding, if possible, an issue which might well be determinative of the overall dispute, thus saving the parties the time, effort and significant expense of what could be a lengthy trial. Accordingly, I would have had little hesitation in determining that the matter could be dealt with by way of application were it not for a line of authorities put before the court by Mr. Ledger which stand for the proposition that the court should not act in half-measures on applications and that it should not deal with issues in a bifurcated fashion if, on one outcome of the argument, the matter should be required to proceed to trial in any event. (at p. 262)

The court rejected the authorities referred to in the above passage as compelling the conversion of the application into an action, holding:

> In my view, fragmentation of the trial and lack of finality are not evils in themselves, in the context of an application, if the end result is to enable the parties to process their dispute more expeditiously and efficiently, and provided there are no material facts which require a trial for their disposition *in relation to the fragmented issue*, and provided there is some reasonable prospect that the resolution of that issue may resolve the *lis* between the parties. (at p.263)

In the end, the court determined that the application could proceed. It noted, however, that:

> The court must be cautious, I think, in embarking upon a procedure which may result in the litigation, and a litigant's right to a trial, being broken up into too many chunks. As long as the court exercises its discretion in a judicial fashion, however, that danger can be controlled, in my view. (at p. 264)

The foregoing review of the jurisprudence reveals that certain principles inform the exercise of discretion in deciding whether to bifurcate a proceeding and determine issues serially. The emergent proposition appears to be that where an issue can be fragmented and decided on the basis of undisputed facts in circumstances where its relationship to the entirety of the dispute is such that its disposition will permit that dispute to be litigated in a more efficient and expeditious manner, then a preliminary determination of the issue may be appropriate. Whether a resolution of the fragmented issue will lead to the more efficient litigation of the entire dispute requires consideration of the nature of the issues in dispute and the desirability of considering them against the backdrop of a full evidentiary record. The applicability of the above considerations to the facts in this case cannot be undertaken without briefly reviewing the leading s. 14 case, *Roberts, supra.*

Roberts involved a situation where the Ministry of Health provided funding to enable persons with various medical conditions to purchase assistive devices, including visual aids. The Complainant, Roberts, had a medical condition that could be assisted by a particular visual aid. Funding for this type of aid would have been available under the program for someone with his medical condition, but only if that person were 22 years of age or younger. Roberts was 73. The Board held that the assistive devices funding scheme was a "special program" under s. 14 (then s. 13) of the *Code*, and that this status insulated it from challenge under s.1. In the Board's view, so long as the program provider had a *bona fide* intention to benefit a disadvantaged group, the efficacy or comprehensiveness of its measures were beyond scrutiny. The Divisional Court agreed and dismissed an appeal from the Board's decision. The majority of the Court of Appeal allowed the appeal. Madam Justice Weiler and Mr. Justice Houlden concurred in the result, but wrote separate reasons. Both of them, however, distinguished between

challenges to ameliorative or affirmative action programs brought by persons never intended to benefit from them, and challenges brought to those programs by persons who fell broadly within the group of those intended to benefit, but who were in fact excluded from participation by the program's eligibility requirements and alleged that the programs were discriminatory because they were underinclusive. In the former situation, s. 14 functions to exempt the special program from allegations that it violates formal equality principles by providing for what is sometimes called "reverse discrimination". In the latter situation, the inquiry focuses on whether the program provides substantive equality for similarly situated members of a disadvantaged group:

> This case does not involve a challenge to the vision aids category of the ADP program by a member from a historically privileged group or from a disadvantaged person whose disability the program was not designed to benefit. Consequently, the exemptive purpose of s. 14(1) is not invoked . . . . We are concerned in this case with a discriminatory refusal of assistance to a person with the specific disability that special program was designed to assist." (at p. 401, per Weiler, J.A.)

Weiler and Houlden, JJ.A., held that restrictions within a program designed to benefit a disadvantaged group should be designed so that they are rationally connected to the program:

> . . . in this case, if it could be shown that those excluded by age from the special program were more advantaged than those who were eligible for the program, there would be a rational basis for the discrimination, and the discrimination on the basis of age would be protected by s. 14(1). However, as I have pointed out and as counsel for the respondent conceded, the age restriction in the ADP has no logical or rational connection with admission to the program and, hence, in my judgement, it is not protected by s. 14(1). (per Houlden, J.A., at p. 429; see also Weiler, J.A., at p. 406)

If the complainants here were persons able to access the TTC's conventional service who alleged discrimination because they were not eligible for Wheel-Trans service, the issue of whether Wheel-Trans constitutes a "special program" might well be an entire answer to that complaint. In those circumstances, it would be appropriate to hear that issue on a preliminary basis, because only the exemptive formal equality aspects of s. 14 would be engaged. The question is whether it is appropriate to decide the s. 14 issue on a

preliminary basis where members of the group Wheel-Trans is designed to benefit bring a complaint respecting the eligibility requirements for that program. As an aside, the Board acknowledges the complainant Shell's submissions to the effect that the recognition in *Roberts* of the exemptive aspects of s. 14 must be read subject to *Lovelace v. Ontario,* [2000] S.C.J. No. 36, but is of the view that the language of s. 14 of the *Code* is sufficiently different from that of s. 15 of the *Charter* that *Lovelace* is of no assistance on this motion.

Based on the excerpts from *Roberts* set out above, it appears that complaints of discrimination grounded in the alleged underinclusiveness or inefficacy of ameliorative programs require a number of determinations to be made:

- the identification of the group intended to benefit;
- its characterization as a disadvantaged group;
- the *bona fides* of the intention to benefit that group;
- the scope of any restrictions on participation in the program; and
- the rationality of any connection between the restrictions on participation and the program goals.

The scope of the evidence required for the above determinations to be made is potentially quite broad. Consequently, the only testimonial efficiencies that might attach to deciding the s. 14 issue up front would be minimal, namely to defer hearing the complainants' evidence respecting the implementation and impact of the Wheel-Trans eligibility requirements. It is not entirely clear, however, that even this efficiency could be achieved, since Houlden, J.A.'s analysis in *Roberts* suggests that determining whether s.14 violates substantive principles of equality may require an assessment of the particular circumstances of complainants, for example, their relative disadvantage. This approach would appear to make inappropriate any preliminary determination with respect to the applicability of s. 14(1) absent an initial inquiry into the circumstances of the complaints and the complainants.

Further to the last point made in the preceding paragraph, the Supreme Court of Canada in *British Columbia (Public Service Employee Relations Commission) v. British Columbia Government and Service Employees' Union (B.C.G.S.E.U.)*, [1999] 3 S.C.R. 3, and *British Columbia (Superintendent of Motor Vehicles) v. British Columbia (Council of Human Rights)*, [1999] 3 S.C.R. 868, also stressed the importance of having regard to the individual circumstances of complainants, particularly where a duty to accommodate may arise. The Board is concerned that it would be unfair in the circumstances of this case to hear and determine the TTC's motion to have Wheel-Trans declared a "special program" on a preliminary basis. The Commission does not merely take issue with whether Wheel-Trans constitutes a "special program", but rather posits an alternative analysis, seeking in the circumstances of this case to have the Board consider Wheel-Trans as a means of accommodating those TTC passengers who cannot access the conventional system. Acceding to the TTC's request to decide the s. 14 issue on a preliminary basis would obviously undermine the Commission's ability to advance this alternative analysis, and would prevent the Board from having before it the kind of evidence the Supreme Court of Canada has suggested it must assess where accommodation is an issue.

In conclusion and summary, the Board grants the Commission's motion to quash the TTC's motion. It would be inappropriate in the circumstances of this case to decide on a preliminary basis whether Wheel-Trans is a "special program" for the following reasons:

- The TTC has not conceded that there has been a *prima facie* contravention of the *Code*;
- The parties have not agreed nor could the Board find on the basis of their submissions that the underlying facts of the complaint are undisputed;
- The complaints cannot be said at this point to engage only the exemptive aspects of s. 14, such that a determination of that issue would dispose of the entire case;
- Not only was there no evidence from which the Board might conclude that it would be expeditious to deal with s. 14 on a preliminary basis, but its consideration of the jurisprudence and the potential scope of evidence required to be adduced suggests that a preliminary determination would not significantly reduce the amount of hearing time required;

- The Commission's ability to advance its alternative analysis of the facts and the requirements of the *Code* would be unfairly circumscribed by a preliminary determination on the applicability of s. 14; and
- The TTC's ability to rely on the provisions of s. 14 in its final argument is not impaired.

Dated at Toronto, Ontario, this 17th day of January, 2001.

Mary Anne McKellar, Vice Chair